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In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, *et al.*,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

On Petitions For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* CITY AND COUNTY OF DENVER ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, NORTHERN COLORADO WATER CONSERVANCY DISTRICT, CITY OF AURORA [COLORADO] IN SUPPORT OF RESPONDENTS SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *ET AL.*

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QUESTION PRESENTED

Residents of the West rely on *Amici* and other municipal water providers to transfer billions of gallons of water every day to meet their basic water needs. The Eleventh Circuit's decision, however, causes significant uncertainty with regard to the applicability of the Clean Water Act's permitting requirements to – and the continued viability of – such essential water transfers. The question the Court should address is:

> Whether the Eleventh Circuit erred by failing to follow a basic tenet of constitutional law that the courts may not alter the established federal-state framework by permitting federal encroachment upon a traditional state power unless Congress conveys its intent clearly, thus allowing federal encroachment upon state water law and water rights in conflict with Congress's clear statements to the contrary.

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I. INTEREST OF *AMICI CURIAE*

Amici Curiae – municipal water providers – submit this brief pursuant to RULE 37.4 of this Court in support of the position of Respondents South Florida Water Management District *et al.* that the Court should grant the Petitions for a Writ of *Certiorari* to review *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *reh'g denied en banc*, 605 F.3d 962 (11th Cir. 2010).[1]

West of the 100th Meridian, the nation is generally arid; that is, the land receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Further, most precipitation falls as snow, invariably far from the major urban and agricultural centers that need the water. *Amici*[2] and other municipal water providers must therefore capture water where and when the snow melts for transfer through complex systems of man-made and natural conveyances and reservoirs to meet year-round needs. For example, the majority of the precipitation in the seven-state Colorado River

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[1] Counsel of record for all parties received timely notice of the *Amici Curiae's* intent to file this brief pursuant to RULE 37.2(a).

[2] *Amici* Denver, Aurora, Metropolitan Water District of Southern California, Truckee Meadows, and Central Arizona Water Conservation District are members of the Western Urban Water Coalition. Other members include Oakland, San Francisco, Phoenix, San Diego, Seattle, Santa Clara Valley, and Las Vegas.

basin, an area encompassing 250,000 square miles, falls as snow on land at elevations above 9,000 feet – just five percent of the basin's land area. *Amici* and other municipal water providers capture and transfer this water to meet municipal water needs in cities like Phoenix, Tucson, and Las Vegas within the basin, and in cities outside the basin, including Los Angeles, San Diego and other southern California coastal cities, Denver, Boulder, Colorado Springs, Fort Collins, Pueblo, Cheyenne, Salt Lake City, Albuquerque, and Santa Fe. In short, water transfers are essential to the West's cities and towns.

Under individual water rights allocated pursuant to state water law, *Amici* and other municipal water providers in the western United States divert water from natural streams and lakes. Many then transfer that water through man-made tunnels, canals, and pipelines into other natural streams and lakes to meet the domestic, agricultural, commercial, and industrial water needs of residents. These water transfers can be as small as the diversion of water from a river by a rural town into a nearby (but hydrologically separate) stream for delivery to its residents or as massive as the transfer of water from the Sacramento River by the federal Central Valley Project and California State Water Project to serve tens of millions of residents throughout central and southern California.

The Metropolitan Water District of Southern California ("Metropolitan"), a public entity made up of 26 member public agencies, imports water from

the Colorado River through the Colorado River Aqueduct and from northern California through the California Aqueduct. *See* map at App. 1. Metropolitan delivers water to nearly 19 million people in a 5,200 square mile service area that includes Los Angeles, Orange, San Diego, Riverside, and Ventura counties. In fiscal year 2009-10, Metropolitan delivered approximately 1.78 million acre-feet of water, the equivalent of over 580 billion gallons.

The City & County of Denver acting by and through its Board of Water Commissioners ("Denver Water") provides an average of 65 billion gallons per year of potable, raw, and recycled water to approximately 1.3 million people in the Denver metro area. Denver Water diverts its supplies from 42 streams and numerous smaller tributaries and transfers it via two pump stations, 77 miles of canals, tunnels, siphons, and four trans-mountain tunnels. Water is stored in 13 reservoirs, with a combined storage capability of over 221 billion gallons. *See* map at App. 2.

The Central Arizona Project ("CAP"), operated by the Central Arizona Water Conservation District, is a 336-mile long water transfer system of pumping plants, concrete-lined canals, inverted siphons, tunnels, and pipelines that annually moves about 489 billion gallons of Colorado River water from Lake Havasu on the Colorado River to central and southern Arizona. The CAP water supply represents Arizona's largest renewable water supply; it serves municipal and industrial customers, non-Indian

agricultural users, and Indian communities. The service area of the CAP encompasses about 80 percent of Arizona's water users, including the Phoenix and Tucson metropolitan areas. There are at least three operational points on the CAP system that release Colorado River water into other waters of the United States. *See* map at App. 3.

The U.S. Bureau of Reclamation's Colorado-Big Thompson Project ("C-BT"), operated by the Northern Colorado Water Conservancy District ("Northern Water"), conveys an average of 74 billion gallons of water per year through the Rocky Mountains and under the Continental Divide to irrigate over 690,000 acres and supply approximately 830,000 people in 33 cities and towns and 16 water districts. C-BT diverts water from 4 source lakes, reservoirs, and streams, and conveys that water by gravity and 3 pump stations through 2 tunnels and 9 canals into at least 17 different streams, rivers, lakes, and reservoirs. *See* map at App. 4.

The City of Aurora is the third largest city in Colorado, with a population of 320,000. Nearly one-half of Aurora's water is supplied from sources in the Arkansas and Colorado River Basins. All of this water is collected at Twin Lakes and is transported to the South Platte Basin via the Otero Pump Station. Water transferred via the Otero Pump Station flows through the Homestake Pipeline and into an open channel to Aurora's Spinney Mountain Reservoir. Water is released from Spinney Mountain Reservoir down the Middle Fork of the South Platte River to

Strontia Springs Reservoir where it is again diverted and piped into Aurora for municipal use. *See* map at App. 5.

The Metropolitan Water District of Salt Lake & Sandy, Utah ("Metro") provides supplemental water that makes up a portion of the supply for an estimated 400,000 people in the Salt Lake Valley. Metro is the largest subscriber of water from the Provo River Project, a U.S. Bureau of Reclamation project completed between the 1930s and 1950s, and the second largest user of water from the Bonneville Unit of the Central Utah Project, another U.S. Bureau of Reclamation project. The Provo River Project includes the Duchesne Tunnel, a 388 million gallons per day ("MGD") capacity tunnel that transfers water from the Duchesne River to the Provo River, and the Weber-Provo Canal, a 646 MGD capacity canal that transfers water from the Weber River to the Provo River. The Bonneville Unit of the Central Utah Project is serving the needs of a growing population in large part through a trans-basin diversion of water from tributaries of the Duchesne River. *See* map at App. 6. Approximately half of Metro's water supply depends upon trans-basin diversions.

The San Juan-Chama Project ("Project") was authorized for construction by Congress in 1956. The Project imports water from the Colorado River basin into the Rio Grande basin, and consists of three diversions in Southern Colorado that divert water from the San Juan River, a tributary of the Colorado River, through a series of tunnels across the

Continental Divide and into Heron Lake on the Rio Chama. *See* map at App. 7. The Project imports about 35 billion gallons of water annually that is provided to San Juan-Chama Contractors at the outlet to Heron Lake. The Albuquerque Bernalillo County Water Utility Authority ("Authority") is the largest San Juan-Chama Contractor and holds a contract for approximately 16 billion gallons per year. This water is the key to the metropolitan Albuquerque area's water future to replace unsustainable ground water mining through the use of surface water. Currently, the Authority is constructing the $375 million Drinking Water Project to transition from the aquifer to San Juan-Chama water. The San Juan-Chama water currently constitutes 90 percent of Albuquerque's supply and will provide more than 70 percent of the supply in 2040.

II. REASONS FOR GRANTING THE PETITIONS

The Court should grant the Petitions for two principal reasons. First, the decision of the Eleventh Circuit conflicts with decisions of other circuits, fostering uncertainty regarding the regulation of water transfers under the Clean Water Act ("CWA" or "the Act"). This uncertainty impedes necessary water supply planning development and operational decision-making. Second, the ruling below ignores the basic tenet of constitutional law that courts may not "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional

state power . . . [u]nless Congress conveys its purpose clearly." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 173 (2001) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). The CWA, however, contains no clear Congressional statement that it intended to encroach on traditional state power to allocate water resources or to supersede or abrogate individual water rights allocated under state water laws. *See* 33 U.S.C. §§ 1251(b) and (g), 1370 (2010).

III. ARGUMENT

A. There is a Conflict Among the Circuits That Impedes Essential Water Supply Planning and Development.

Amici and other municipal water providers face increasing uncertainty from litigation over the applicability of CWA permitting requirements to water transfers. The First and Second Circuits have held that the plain language of the CWA requires National Pollutant Discharge Elimination System ("NPDES") permits for certain water transfers. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006). The *Catskill* court also rejected deference to the U.S. Environmental Protection Agency's ("EPA") interpretation of the CWA. 451 F.3d at 83 n.5. In this case, the Eleventh Circuit deferred to EPA, which had concluded that NPDES permits are not

necessary, creating a conflict among the circuits. *Friends of the Everglades*, 570 F.3d at 1227-28.

Additional uncertainty flows from the numerous challenges to EPA's Water Transfers Rule, which has been stayed pending resolution of this litigation. Order (Nov. 14, 2008), *Friends of the Everglades v. U.S. Envtl. Prot. Agency*, 08-13652-CC (11th Cir.) (consolidated with 08-13653-CC, 08-13657-CC, 08-14247-CC, 08-14471-CC, 08-14921-CC, 08-16270-CC, 08-16283-CC, 08-17189-CC, and 09-10506-CC). Moreover, EPA is reconsidering its Water Transfers Rule, which currently exempts water transfers from NPDES permitting. Resp. of U.S. to Pet. for Reh'g at 15, *Friends of the Everglades*, 605 F.3d at 962.

This uncertainty about the reach of the CWA interferes not only with the water supply planning and development of *Amici* and other municipal water providers who supply water to tens of millions of western residents every day, but also places a cloud over the continued viability of *Amici* and other municipal water providers' current water supplies. Further, even as the West continues to grow, its historical water supplies may be diminishing as a result of climate change, necessitating new water transfers to meet demand. *Amici* therefore urge the Court to grant *certiorari* to resolve the continuing uncertainty in the interests of judicial efficiency and economy, to end costly and burdensome litigation, and to remove uncertainty that impedes essential water supply planning, development, and operational decision-making.

B. The Clean Water Act Does Not Contain a "Clear and Manifest Statement" From Congress That Alters the Established Federal-State Framework and Permits Federal Encroachment Upon Traditional State Power to Allocate Water Resources.

The Eleventh Circuit's decision ignores the basic tenet of constitutional law that courts may not "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional state power . . . [u]nless Congress conveys its purpose clearly." *SWANCC*, 531 U.S. 173. *See also*, *Rapanos v. United States*, 547 U.S. 715, 738 (2006) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."). The CWA contains no such clear and manifest statement. In contrast, Congress clearly wrote deference to state water law directly into the statute. *See* 33 U.S.C. §§ 1251(b) and (g), 1370. Requiring NPDES permits for water transfers would abrogate state-allocated water rights by making it impossible for *Amici* and other municipal water providers to exercise their rights, as explained below.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, this Court theorized that construing the NPDES program to cover water transfers could raise the costs of water distribution prohibitively, which would impair the exercise of state-granted water rights. 541 U.S. 95, 108 (2004). To

avoid that result, this Court postulated that general permits might ameliorate the impact. *Id.* Unfortunately, general permits would provide no relief to water rights owners such as *Amici* and would, in practice, abrogate such water rights.

All NPDES permits – general as well as individual – must include limitations to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A) (2010). Moreover, "[n]o permit may be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA." 40 C.F.R. § 122.4 (2010). If required to operate under NPDES permits, *Amici* and other water suppliers would have no alternative but to curtail their transfers because construction of treatment facilities designed to capture spring runoff and meet the effluent discharge limits of the CWA would be cost prohibitive and impractical.

1. Water Quality Standards.

If a discharge merely has the "potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i) (2010). *See also, Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) ("The [CWA] does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act

categorically prohibits any discharge of a pollutant from a point source without a permit."). Thus, an NPDES permit would be necessary even where no impairment is in evidence, and such permit would contain conditions that limit the amount of pollutants delivered to the receiving waters, even where standards are in fact met, simply based upon a determination that there might be a potential cause of an exceedance.

Meeting such permit conditions would be impossible in many instances simply due to natural conditions, such as high turbidity (muddiness) during spring runoff or following heavy rainfall events. Further, water quality almost inevitably varies between basins. The movement of water from one basin to another could be subject to permit requirements even though the transferor has no ability to control naturally-occurring or ubiquitous pollution. The only sure way for an operator of a water transfer to control introduction of different pollutants into receiving waters would be to transfer no water at all.

Colorado, for example, has adopted water quality standards for thirty-six different naturally-occurring pollutants, including suspended solids. 5 COLO. CODE REGS. § 1002-31.16 (2010). The presence of these constituents is influenced by snowmelt, rain runoff, and reservoir storage. Water quality standards include numerous metals commonly present downstream from Colorado's mineralized mountains. *Id.* Runoff from snowmelt and storm events naturally contains elevated levels of total suspended solids, i.e.,

particles of soil and sediment, and turbidity from erosion caused by rapid runoff and accompanying high stream flows. As runoff flows from the mountains to the plains below, it deposits these regulated parameters directly into water conveyances, which are typically open canals and ditches. The source water itself, such as the headwaters of the Colorado River, may be naturally high in total dissolved solids such as salts as a result of its passage through saline geological formations and inflows from brackish hot springs. Although suspended solids and turbidity conveyed into a stream or open ditch may eventually settle out downstream, their temporary presence could contribute to loadings in the receiving waters that would exceed water quality standards. Such exceedances – even though a result of natural processes – would expose the water transferor to enforcement action and citizen suits. 33 U.S.C. §§ 1313, 1365 (2010). Similar concerns would arise relative to temperature regulations as water is transported through a variety of elevations with different climate regimes or is transferred from reservoir storage, where it has typically warmed, to potentially colder receiving waters.

2. Inability to Treat Transfers.

To avoid the potential to cause an excursion above the water quality standards of the receiving water body during spring runoff or following a thunderstorm, the water providers using water transfers might have to expend hundreds of millions of dollars

to construct one or more treatment facilities to reduce the presence of even the naturally occurring constituents described above. Each facility would be required to treat peak flows – which might occur just one or two days a year during spring snowmelt – to avoid violating the water quality standards of receiving waters or irretrievably losing essential water supplies. Further, expensive treatment plants would operate for only a few weeks or months because water is usually available for transfer only during snowmelt (50 percent of mountain stream flow occurs in just three months: May, June, and July).

As one example, the Bureau of Reclamation's C-BT Project, operated by Northern Water and described above, transfers water from the Colorado River and delivers it through a tunnel under the Continental Divide for municipal, agricultural, and other uses in northeastern Colorado. The C-BT Project diverts water from four source lakes, reservoirs, and streams and conveys that water by gravity and three pump stations through two tunnels and nine canals into and then out of at least 17 different natural streams and rivers that are integral parts of the water transfer. Transfers average 220 MGD and peak at 275 MGD, substantial but not unusually large water transfers in the West. Even assuming that the necessary infrastructure could be put in place to handle spring peaking flows, the potential capital cost to treat C-BT water even once could exceed $315 million, double the initial cost of the entire C-BT Project. Furthermore, the C-BT Project might have to

treat essentially the same water 17 times – at every point water is transferred to a lake, reservoir, or stream for downstream delivery. Such treatment would be prohibitively expensive. And, without the ability to treat peaking flows, the C-BT Project's water transfers would face an uncertain future.

Many water transfers, including the C-BT Project, traverse federal lands that include national parks and national forests adjacent to wilderness areas. Moreover, the removal of pollutants by a treatment plant produces a "sludge," which requires appropriate disposal. Given the location of many transfers within or near pristine areas, combined with the need for large sites for treatment facilities and sludge disposal, the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable for many essential water transfers. Simply stated, the land use approvals necessary to build the treatment facilities and dispose of the waste may be impossible to obtain.

For these insurmountable practical and financial reasons, application of the NPDES program to water transfers could preclude such transfers altogether. In so doing, the NPDES program would supersede or abrogate state-allocated water rights, contrary to Congressional directives in the CWA. *See* 33 U.S.C. §§ 1251(b) and (g), 1370.

CONCLUSION

Nothing is more critical to the West and *Amici* than their continued ability to utilize scarce water resources when and where they are needed. As explained above, water supply in the West necessarily involves the collection, storage, and transfer of water through pipelines, tunnels, canals, and natural waterbodies. Extension of the NPDES program to such water transfers would "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional state power" without Congress conveying its purpose clearly. *SWANCC*, 531 U.S. at 173. Further, the NPDES program would supersede or abrogate state-allocated water rights contrary to Congress's directives in the CWA. 33 U.S.C. §§ 1251(b) and (g), 1370. Such water management activities must remain, as they always have been, a state prerogative to align available water supplies with essential needs.

For the forgoing reasons, *Amici Curiae* municipal water providers respectfully urge the Court to grant the Petitions for a Writ of *Certiorari*.

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